THE DIRECTOR OF CENTRAL INTELLIGENCE

OLC-78-2002/n

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Leg. Reg.

19 JUL 1978

Office of Legislative Counsel

Honorable William S. Broomfield
Ranking Minority Member
Committee on International Relations
House of Representatives
Washington, D.C. 20515

Dear Mr. Broomfield:

I am writing to express our concerns with certain provisions of H.R. 12598, the "Foreign Relations Authorization Act, FY 79," which passed the House on 31 May 1978 and the Senate (Senate version formerly number S. 3076) on 28 June 1978. Both Houses have appointed conferees--for the House, all members of the International Relations Committee--who are expected to meet shortly.

The Senate bill contains two provisions which have been and remain of particular concern to us; these were not amended at all on the floor: --Section 119, amending the so-called "Role of the Ambassador Legislation" (22 U.S.C. 2680a); and, --Section 501, amending the so-called "Case-Zablocki Act" (1 U.S.C. 112b).

Section 119 of the Senate bill, concerning the Role of the Ambassador Legislation, would amend 22 U.S.C. 2680a by adding the following language to paragraph (3) between the words "country" and "shall": "notwithstanding any other provision of law." This amendment is of concern to us because of its potential construction as superseding the statutory authority of the Director of Central Intelligence to protect intelligence sources and methods against unauthorized disclosure (section 102(d)(3) of the National Security Act of 1947, as amended, 50 U.S.C. 403). Further, the proposed additional language could be viewed by liaison services and other intelligence sources as a further weakening of the Government's resolve to limit dissemination of intelligence sources and methods.

The amendment in section 119 would leave intact the present prefatory language to 22 U.S.C. 2680: "Under the direction of the President--" In our view, this language provides the appropriate statutory formula reflecting the respective responsibilities, in terms of our interests for example, of the Director of Central Intelligence and the Secretary of State. Addition of the language "notwithstanding any other provision of law" could be construed as relegating the President's authority under 22 U.S.C. 2680a to a purely ministerial (i.e., non-discretionary) function. Such a construction, which is not unreasonable under the proposed language, in our view would pose serious problems.

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Moreover, addition of the proposed language could be construed as a statutory supersession of the Director's authority cited above. In our view, this is both unnecessary and inappropriate, and we would oppose inclusion of this language in the legislation. This view is the Administration's position on this matter.

Sections 501 and 502 of the Senate bill, concerning the determination and reporting of "international agreements" pursuant to the Case-Zablocki Act, would, among other things, amend 1 U.S.C. 112b by providing as follows:

1. Oral agreements would have to be reduced to writing and thereafter reported to the Congress if determined to be "international agreements."

2. No "international agreement" (including intelligence agreements) could be signed or concluded without the prior approval of the Secretary of State or the President.

3. The Secretary of State is expressly granted the power to determine, for the Executive Branch, what arrangements constitute "international agreements."

4. Rules and regulations necessary to carry out the Case-Zablocki Act shall be issued by the President, through the Secretary of State.

In our view, a statutory requirement concerning oral agreements could pose a serious practical burden in terms of what should be "reduced to writing" and in what terms; the numbers of such matters could be extremely large. More significantly, in terms of intelligence equities, the provisions in section 501 of the Senate bill that relate to oral agreements could have serious negative impact on intelligence activities conducted pursuant the Director's authority which may involve, for example, liaison re ships with foreign counterparts. This impact could extend not only the Director's ability to protect sensitive intelligence information from disclosure, but to our ability in the first instance to maintain certain authorized intelligence relationships, which are dependent on the willingness of foreign entities to deal with us. For these reasons, we would oppose inclusion in legislation of the provisions in H.R. 12598 relating to oral agreements. The Administration's position in opposition to this provision is contained also in a letter to you from Assistant Secretary of State Douglas Bennet, dated 27 June 1978.

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We are also concerned with those provisions in section 501 regarding prior approval of agreements by the Secretary of State or the President. As to intelligence matters conducted pursuant to the authority of the Director, requiring the approval of the Secretary of State is inappropriate. The alternative of placing the burden on the President for reviewing and approving intelligence activities that are conducted by CIA which, in the first instance is under the National Security Council, of which the President is a member (50 U.S.C. 402-403), is at once unnecessary and inappropriate in statute. We believe this provision in section 501 should be deleted; we believe, however that the position, reflected in the 27 June 1978 letter from Assistant Secretary of State Douglas Bennet, that the provision be amended to require "consultation" rather than "prior approval," is an improvement over existing language.

Finally, as to section 501 of H.R. 12598 as passed by the Senate, in our view the provision requiring that the President issue rules and regulations to implement 1 U.S.C. 112b inappropriately specifies that this shall be done "through the Secretary of State." This additional provision is unnecessary and could confuse the ultimate responsibility of the President to issue the relevant rules and regulations, in consultation with, or as delegated to, those of his officers as he deems appropriate, not necessarily limited to the Secretary of State. Agencies and departments other than the Department of State are affected by, or conduct activities that are required to be reported under, the Case-Zablocki Act. We therefore recommend deletion of the words "... through the Secretary of State ..." from proposed subsection (d) in section 501. Finally, it is inappropriate, as provided in proposed subsection (b), that the President be burdened with a statutory requirement to report in detail and in writing annually to the Congress merely to inform the Congress that certain agreements were transmitted late.

The companion bill as passed by the House does not contain the provisions as discussed above. I would like to bring to your attention, however, a concern with regard to Title V of H.R. 12598 as passed by the House. Title V, entitled "Science, Technology, and American Diplomacy," includes provisions apparently designed to consolidate policy control of international activities involving science and technology under the Secretary of State.

Briefly, in our view, these provisions in Title V present problems because the underlying terminology--"science and technology" activities, initiatives and agreements--is not defined and, as a result, the provisions could be fairly construed as applying to activities involving intelligence activities conducted by the CIA concerning, for example, liaison activities with intelligence and internal security services of foreign governments insofar as such activities might involve "science or technology" matters. While we have no quarrel with the concept that national foreign intelligence activities should be fully consistent with foreign policy objectives, this legislation could be construed to require unnecessary proliferation of detailed information regarding intelligence relationships with foreign governments within the Executive Branch and the Congress.

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Intelligence relationships with foreign governments, including relationships involving highly sophisticated and technologically advanced collection systems, are among the most sensitive of intelligence sources and methods, and proliferation of information concerning those relationships could not only jeopardize cooperation with respect to particular activities, but also jeopardize cooperation in general, and valuable intelligence could be lost.

It is our understanding that intelligence activities are not intended to fall within the terms of Title V. Although the report on this bill filed by the International Relations Committee contains language in the analysis of subsection 503(c) to this effect, we believe the report language fails to address fully our concerns that the scope of the title is not clear. Moreover, these provisions are troublesome generally in terms of unclear ambiguity and serious problems that would arise in attempting to implement them. For these reasons, we oppose enactment in their present form of the "Science and Technology" provisions in H.R. 12598.

I would like to address one other issue herein which deals with a floor amendment introduced by Senator McGovern during the Senate debate on the bill on 28 June. Senator McGovern proposed a number of amendments including one that would in effect require Federal agencies and departments with information within the jurisdiction of the Foreign Relations and International Relations Committees to provide that information regardless of the so-called "third agency rule"; this amendment was adopted. The specific provision in the basic Department of State enabling legislation so amended would read as follows (new language underlined):

> "SEC. 15(b). The Department of State shall keep the [Foreign Relations and International Relations Committees] ... fully and currently informed with respect to all activities and responsibilities within the jurisdiction of these Committees. Any Federal department, agency, or independent establishment shall furnish any information (notwithstanding the department, agency, or independent establishment of origin) requested by either such Committee relating to any such activities or responsibilities."

This floor amendment is problematic from two viewpoints. First, the amendatory provision is unnecessary since it does not give the committees any further right to information than they already possess. Secondly, the provision may be counterproductive since it arguably may encourage some agencies to restrict State Department access to information, thereby inhibiting the Department's ability to fulfill other statutory requirements. Accordingly, we would recommend that the 15(b) amendatory language be deleted.

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I bring these matters to your attention with a request that the conferees review them pursuant to their responsibilities in conference. We would welcome the opportunity to discuss these matters with you in an effort to ensure that the Director's equities are not adversely affected by the legislation. I am also enclosing short, informal talking points papers on the three problems with the Senate bill; these contain, in outline form, our views on these proposed amendments.

Sincerely,

SIGNED

Frederick P. Hitz
Legislative Counsel

Enclosures

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TALKING POINTS RE AMENDMENTS TO THE ROLE OF THE AMBASSADOR LEGISLATION (H.R. 12598)

The Senate has proposed including the proviso "notwithstanding any other provision of law" in the existing statutory formulation on the Role of the Ambassador legislation (22 U.S.C. 2680a) so that the provision would read in pertinent part as appears on the attached sheet (amendatory language underlined). The following points are relevant:

--Even though the prefatory "Under the direction of the President" language would remain unchanged, the amendatory provision could be construed as a derogation of existing Presidential authority. Inclusion of the amendatory "Notwithstanding..." language could be construed to mean that the President's authority to determine what information may be withheld from an Ambassador is ministerial only rather than discretionary; i.e., the President would only be able to decide the manner in which the Ambassador would be informed and not the crucial issue of whether and to what extent the Ambassador should be so informed.

--The proposed additional language could be viewed by liaison services and other intelligence sources as further weakening of the Government's resolve to limit dissemination of information regarding intelligence sources and methods.

--Arguments that the additional language would not affect existing procedures and requirements are specious. If this were true, there would be no need for the amendment; and there is always a presumption that any provision in a statute is there to serve a purpose (in this case to change procedures established to date controlling the relationship between the CIA Chief of Station and the U.S. Ambassador). Moreover, there is already clear legislative history indicating the amendment is intended to "solve" CIA-State problems that have arisen notwithstanding the existing statute (in fact, there are no such problems).

--Arguments that the amendment does not change existing procedures would be temporary assurances and subject to change at any time.

--As a practical matter, the new language would result in questions concerning access to information having to go to the President with greater frequency and on less significant issues than at present; this would be administratively burdensome.

--There are other statutory provisions that could be affected by inclusion of the amendatory language; for example, provisions of the Privacy Act protecting information against disclosure.

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Section 119 (of H.R. 12598). "Authority and Responsibility of the United States Chief of Missions."

Note: Section 119 of H.R. 12598 as passed by the Senate would amend Section 16 of the act entitled "An act to provide certain basic authority for the Department of State" (22 U.S.C. 2680a) to read as follows:

"SEC. 16. Under the direction of the President -

* * *

(3) any department or agency having officers or employees in a country shall, notwithstanding any other provision of law, keep the United States Ambassador to that country fully and currently informed with respect to all activities and operations of its officers and employees in that country, and shall insure that all of its officers and employees, except for personnel under the command of a United State area military commander, comply fully with all applicable directives of the Ambassador."

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TALKING POINTS PAPER RE CASE-ZABLOCKI ACT AMENDMENTS (H.R. 12598)

Section 501 of H.R. 12598 concerns the determination and reporting of "international agreements" pursuant to the so-called "Case-Zablocki Act" (1 U.S.C. 112b). Among other things, section 501 would amend 1 U.S.C. 112b by providing as follows:

1. Oral agreements would have to be reduced to writing and thereafter reported to the Congress if determined to be "international agreements."
2. No "international agreement" could be signed or concluded without the prior approval of the Secretary of State or the President.
3. Rules and regulations necessary to carry out the Case-Zablocki Act shall be issued by the President, through the Secretary of State.

The following points are relevant:

--Not only is the inclusion of oral agreements in Section 501 inconsistent with the present law and procedures developed thereunder, but it would also prove to be unacceptably burdensome in practice and impossible to enforce. This problem would result from the difficulty inherent in determining what activities or arrangements must be reduced to writing, and from the fact that the number of such matters that would have to be so considered in order to determine whether they constitute international agreements would be extremely large.

--The oral agreements provision could have a serious negative impact on intelligence activities involving liaison relationships with foreign intelligence and security services. As a result of such a statutory provision, foreign intelligence and security services would almost certainly question the ability of the U.S. Government to securely maintain the terms of such authorized relationships and would reexamine their willingness to deal with the U.S

--Insofar as concerns intelligence matters conducted pursuant to the authorities of the DCI, requiring prior approval of such agreements by the Secretary of State is inappropriate.

--Placing a statutory burden on the President for reviewing and approving intelligence activities conducted by the CIA which, in the first instance is under the NSC, of which the President is a member (50 U.S.C. 402(a)), is unnecessary and inappropriate.

--It is also inappropriate that the President be burdened with a statutory requirement to report in detail and in writing annually to the Congress merely to inform the Congress that certain agreements were transmitted "late." (Subsection 501(b).)

--Subsection 501(d) inappropriately specifies that the President shall issue rules and regulations to implement 1 U.S.C 112b "through the Secretary of State." This provision is unnecessary and could lead to confusion as it is the ultimate responsibility of the President to issue the relevant rules and regulations in consultation with those of his officers as he deems appropriate, not necessarily limited to the Secretary of State.

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TALKING POINTS PAPER ON SUBSECTION 15(b),
THIRD AGENCY RULE AMENDMENT (H.R. 12598)

Senator McGovern proposed a number of amendments to H.R. 12598 including one that would in effect require Federal agencies and departments with information within the jurisdiction of the Foreign Relations and International Relations Committees to provide that information regardless of the third agency rule; this amendment was adopted. The specific provision in the basic Department of State enabling legislation so amended would read as follows (new language underlined):

> "SEC. 15 (b). The Department of State shall keep the [Foreign Relations and International Relations Committees]... fully and currently informed with respect to all activities and responsibilites within the jurisdiction of these Committees. Any Federal department, agency, or independent establishment shall furnish any information (notwithstanding the department, agency, or independent establishment of origin) requested by either such Committee relating to any such activities or responsibilties."

With regard to Section 15(b) the following points should be made:

--The amendatory provision is unnecessary since it does not give the Committees any further right to information than they already possess.

--The provision may be counter productive since it arugably may encourage some agencies to restrict State Department access to information, thereby inhibiting the Department's ability to fulfill other statutory requirements.

--The provision could in practice remove an important step in the process of providing Executive Branch material to the Congress; namely, review of material by the originating agency so as to ensure that the information is placed in the context of other relevant related or background information.

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